Voon Jan Choo v Lee Chie Siang & Anor

HIGH COURT (KUCHING) — CIVIL APPEAL NO 12–26–2006-II
HAMID SULTAN JC
29 JUNE 2007

Tort — Negligence — Contributory negligence — Liability — Motorcar accident — Appellant crossed busy street without using zebra crossing — Whether appellant was contributorily negligent

Tort — Damages — Assessment — Damages for negligence — Whether trial judge was right in assessing damages

An accident occurred on 24 February 2001 along Jalan Tunku Abdul Rahman involving the appellant (pedestrian) and a motorcar driven by the first respondent. The accident occurred on the middle lane of Jalan Tunku Abdul Rahman as the appellant was in the process of crossing the road. There was a zebra crossing nearby which the appellant did not use as she felt it was inconvenient. While crossing, the appellant paused for a while to allow a lorry to pass. It was then that the first respondent overtook the lorry and knocked into her. The first respondent stated that, at the time, he was driving behind the lorry and was in the process of changing lanes from the far right to the middle lane. It was then that he saw the appellant but could not stop in time. The respondent also offered to take the appellant to SGH but the appellant went instead to NMSC (a private hospital). The session court judge found the respondent 100% liable for the accident but only allowed 1/3 of the medical expenses incurred at NMSC as the appellant had not justified seeking medical treatment at a private hospital. The appellant appealed as to the damages awarded and the respondent cross appealed as to liability, inter alia, pleading contributory negligence.

Held, allowing the respondents' cross appeal and dismissing the appellant's appeal:

(1) The appellant should not have crossed the said road at the material time. A prudent thing for her to do would have been to wait for the traffic to clear and should not have just simply assumed that it would still be safe to cross the road. It was so imprudent and careless of the appellant to still proceed to cross despite the fact that she was well aware of the high risk, uncertainty and danger involved. Alternatively, the appellant should have used the zebra crossing in front of the Holiday Inn to cross. Her reason that it was very far and not practical to use was not acceptable at all (see para 6).

(2) There was some act of negligence committed by the appellant (see para 12). The appellant could have avoided the accident by taking reasonable care but

did not do so. This did not mean that a motor vehicle when passing a busy part of the city can evade total liability after having knocked into pedestrians The driver must have anticipated an accident and taken precautionary measures such as defensive driving to ensure that pedestrians who have erred in their judgment in crossing are not knocked into. The judgment of the sessions court judge was substituted to 50:50 basis (see paras 23–25).

(3) The sum of RM14,000 for the mild compression fracture of T11 awarded by the sessions court to the appellant was fair and reasonable. As to the claim for visit by family members, the trial judge was right in disallowing the claim by the appellant for cost of visit by family members (see *Lai Chi Kay & Ors v Lee Kuo Shin* [1981] 2 MLJ 167 followed). In respect of costs of care by the appellant's mother, the trial judge was not wrong when he took judicial notice of the current trend of hiring an Indonesian maid in Kuching and also the condition of the appellant when allowing the sum of RM350 per month. On the ground that the appellant was earning more than RM1,000 per month, since the conclusion by the sessions court judge on total pay per month depended entirely on the credibility of the appellant and PW5 and the impression formed by the court which had seen them, it was not desirable for the appellate court to interfere with the finding (see paras 15–18). On the issue whether the court was right in only allowing 1/3 of the medical expenses, on the facts of the case, the finding and the discretion of the court must not be disturbed (see para 22).

[Bahasa Malaysia summary

Satu kemalangan berlaku pada 24 Februari 2001 di Jalan Tuanku Abdul Rahman melibatkan perayu (pejalan kaki) dan sebuah kereta yang dipandi oleh responden pertama. Kemalangan berlaku di lorong tengah Tuanku Abdul Rahman semasa perayu sedang melintas jalan. Terdapat lintasan belang berdekatan yang tidak digunakan oleh perayu kerana beliau merasakan ia tidak memudahkan. Semasa melintas, perayu berhenti sejenak untuk membenarkan sebuah lori lalu. Pada mas itulah responden pertama memotong lori tersebut dan melanggarnya. Responden pertama menyatakan bahawa, pada masa itu, beliau sedang memandu di belakang lori itu dan dalam proses menukar lorong dari bahagian kanan ke lorong tengah. Pada masa itulah beliau melihat perayu tetapi tidak dapat berhenti dengan segera. Responden juga telah menawar kepada perayu untuk menghantarnya ke SGH tetapi perayu telah pergi ke NMSC (sebuah hospital swasta). Hakim mahkamah sesyen mendapati responden bertanggungjawab 100% untuk kemalangan tersebut tetapi hanya membenarkan 1/3 perbelanjaan perubatan yang dibelanjakan di NMSC kerana perayu tidak menjustifikasikan rawatan perubatan yang dirujuk di hospital swasta itu. Perayu merayu untuk ganti rugi yang diawardkan dan responden telah membuat rayuan balas terhadap liabiliti, memplidkan kecuaian sertaan.

Diputuskan, membenarkan rayuan balas responden-responden dan menolak rayuan perayu:

(1) Perayu tidak sepatutnya melintas jalan tersebut pada masa matan. Apa yang sewajarnya beliau lakukan adalah untuk menunggu sehingga lalu lintas selamat untuk dilintas dan tidak sepatutnya menganggap ia masih selamat untuk melintas jalan tersebut. Adalah tidak wajar dan tidak berhati-hati untuk perayu melintas meskipun pada hakikatnya beliau sedar tentang risiko tinggi, ketidaktentuan dan bahaya di hadapan. Secara alternatif, perayu sepatutnya menggunakan lintasan belang di hadapan Holiday Inn untuk melintas. Alasannya bahawa ia tidak praktikal untuk digunakan tidak boleh diterima sama sekali (lihat perenggan 6).

(2) Terdapat perbuatan cuai yang dilakukan oleh perayu (lihat perenggan 12). Perayu mungkin boleh mengelakkan kemalangan itu dengan mangmabil sikap berhati-hati tetapi tidak berbuat sedemikian. Ini tidak bermaksud kenderaan yang lalu lalang di bahagian yang paling sibuk boleh mengelak daripada liabiliti keseluruhan selepas melanggar pejalan kaki. Pemandu tersebut telah menjangkakan satu kemalangan dan telah mengambil langkah-langkah berhati-hati seperti memandu dengan mempertahankan diri untuk memastikan pejalan kaki yang silap percaturan semasa melintas tidak akan dilanggar. Penghakiman hakim mahkamah sesyen digantikan kepada asas 50:50 (lihat perenggan 23–25).

(3) Jumlah RM14,000 untuk fraktur pemampatan yang ringan kepada T11 yang diawardkan oleh mahkamah sesyen kepada perayu adalah adil dan munasabah. Berhubung tuntutan untuk lawatan oleh ahli keluarga, hakim perbicaraan adalah betul untuk tidak membenarkan tuntutan oleh perayu untuk kos lawatan oleh hali keluarga itu (lihat *Lai Chi Kay & Ors v Lee Kuo Shin* [1981] 2 MLJ 167 diikut). Berhubung alasan bahawa perayu mendapat gaji lebih RM1,000 sebulan, memandangkan kesimpulan hakim mahkamah sesyen tentang bayaran keseluruhan sebulan bergantung kepada kebolehpercayaan perayu dan PW5 dan tanggapan yang dibentuk oleh mahkamah yang telah melihat mereka, bukan keinginan mahkamah rayuan untuk campur tangan dengan penemuan tersebut (lihat perenggan 15–18). Berhubung isu sama ada mahkamah adalah betul membenarkan 1/3 daripada perbelanjaan perubatan, berdasarkan fakta kes, penemuan dan budi bicara mahkamah tidak patut diganggu (lihat perenggan 22).]

Notes

For cases on assessment of damages for negligence, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 158–165.

For cases on contributory negligence, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 880–931.

Cases referred to

Bong Miew v Patrick Ting [1981] 2MLJ 209 (refd)
Caswell v Powell Duffyyn Associated Collieries Ltd [1939] 3 All ER 722 (refd)
Chan Kok Sing & Anor v Koo Lan [1966] 1 MLJ 170 (refd)
Chang Kan Nan v Ludhiana Transport Syndicate [1950] MLJ 299 (refd)
China Airlines Ltd v Maltran Air Corp Sdn Bhd [1996] 2 MLJ 517 (refd)

Clarke v Edinburgh Tramways Co (1919) SC (HL) 35 (refd)
Eng Thye Plantations Bhd v Lim Heng Hock & Ors [2001] 4 MLJ 26 (refd)
Foo Siang Him v AG [1986] 2 MLJ 267 (refd)
Hamzah bin Ghani v Verghese Thomas [1981] 2 MLJ 329 (refd)
Huo Heng Oil Co v Tang Tiew Yong [1987] 2 MLJ 723 (refd)
Ismail bin Haji Manap & Anor v Onn Swee Imm [236] MD 6; [1992] 2 CLJ 1157 (refd)
KR Taxi Services Ltd & Anor v Zaharah & Ors [1969] 1 MLJ 49 (refd)
Lai Chi Kay & Ors v Lee Kuo Shin [1981] 2 MLJ 167 (folld)
Lew Fa v Seng Chong Metal Works Ltd [1966] 1 MLJ 231 (refd)
Lim Kar Bee v Abdul Latif bin Ismail [1978] 1 MLJ 109 (refd)
Noor Famiza bte Zabri & Anor v Awang bin Muda & Anor [1994] 1 MLJ 599 (refd)
Omnibus Co Bhd v North South Transport Sdn Bhd [1978] 2 MLJ 246 (refd)
Ramla v Batcha [1966] 1 MLJ 183 (refd)
Seng Heng Electrical v Chua Len Teng [1970] 1 MLJ 67 (refd)
Soo Wai Seng v Tan Kim Lock [1986] 2 MLJ 61 (refd)
Tan Kuan Yau v Suhindrimani [1985] 2 MLJ 22 (refd)
Tominan bte Tukimin v Toh Kai Chup [1985] 2 MLJ 345; [1984–1985] SLR 604 (refd)
Wong Ah Sing v Government of Singapore & Ors [1968] 1 MLJ 1 (refd)
Yin Xiao Lian v Ang Hoo Kim [135] MD 6 (refd)
Yong Nyee Fan & Sons Sdn Bhd v Kim Guan & Co Sdn Bhd [1979] 1 MLJ 182 (refd)

Legislation referred to
Evidence Act 1950 ss 3, 101

Arthur Lee (Siti Emilianan Edmud with him) (Arthur Lee Lin & Co) for the appellant/plaintiff.
Wejok Tomik (Reddi & Co) for the respondents/defendants.

Hamid Sultan JC:

[1] This is my judgment in respect of the appellant/plaintiff's claim in respect of quantum and the cross-appeal by the respondent/defendant in respect of liability, arising as a result of a motor accident, wherein the plaintiff sustained injury and upon full trial the learned sessions judge had found the defendants 100% liable and awarded damages.

[2] The brief facts of the case can be summarised as follows: (a) the accident occurred on the 24 February 2001 @ 11.15am along Jalan Tunku Abdul Rahman involving the appellant (pedestrian) and a motorcar bearing registration no QKF1991Q driven by the first respondent. (b) at the material time of accident, the appellant was in the process of crossing Jalan Tunku Abdul Rahman from Sarawak Plaza heading to Tun Jugah building. (c) the point of impact was at the middle lane of Jalan Tunku Abdul Rahman, not far from the middle left entrance of Tun Jugah building. (d) Jalan Tunku Abdul Rahman is a straight one way road with three lanes.

A The far right lane of Jalan Tunku Abdul Rahman only allows vehicles going towards Padungan.

[3] Appellant's version of the accident and the evidence as adumbrated by the respondent can be summarised as follows: (a) in her evidence-in-chief, the appellant B testified that she was crossing the road along Jalan Tunku Abdul Rahman (from Sarawak Plaza to Tun Jugah building) intending to go to her workplace. As she was crossing the road and when she almost reached the other side, she stopped for a while to let a lorry pass. Suddenly, a motorcar overtook the lorry at a high speed and it knocked into her; (b) on cross-examination, the appellant testified as follows: (i) at that material time, the traffic was moderate; (ii) she admitted that before she crossed, C she did see the lorry coming and she knew that she had to stop in the middle of the road to let the lorry pass; (iii) she acknowledged that despite having seen the lorry coming, she continued to cross; (iv) she agreed that when she reached the middle lane, the lorry was too near to her so she had to stop to let the lorry pass; (v) she did not see the respondent's car before she crossed. She concurred that she could not see D the Respondent's car because her view was blocked by the lorry. However, she further testified that the respondent's car was just behind the lorry before it knocked against her; (vi) she was aware of the zebra crossing at the Holiday Inn. She agreed that it would have been safer to cross at the pedestrian crossing at the Holiday Inn. She was aware that the purpose of installing pedestrian crossing at Holiday Inn and Mc Donald is for safer crossing because the traffic there is always busy. But she did E not cross through it because it was more convenient, near and direct to cross in front of the entrance of Tun Jugah building.

[4] The respondent's version of the accident and the evidence can be summarised as follows: (a) it is the first respondent's evidence that on that morning of 24 February F 2001, he was driving his mother's car QKF1991Q from home at Jalan Stampin intending to go to Public Bank at Jalan Abell. Travelling. In the car with him was his friend Ms Winnie Ling. At the material time, he was driving at a speed of about 50km/ph. Whilst at Jalan Tunku Abdul Rahman, approaching the Tun Jugah building (at the material time he was following a medium size lorry (3 tons) travelling G in front at the far right lane there at), he intended to change his lane to the middle lane to go to Jalan Abell and in the process of changing his lane from the far right lane to the middle lane, his car collided with a pedestrian (appellant) who was standing at the middle of the said road (in the middle lane there at). (b) he was extremely shocked and he panicked and immediately applied the brakes. He did not expect at all for the appellant to cross and to be at the middle of the said road (middle H lane), standing there at as there were vehicles travelling on the said road. At the material time, the traffic was moderate and there was a lorry travelling just in front of his car and there was another car travelling at the far left lane of the said Jalan Tunku Abdul Rahman. He was not able to see the presence of the appellant standing in front because of the lorry travelling in front of his car at the material time. He only I noticed the appellant after he changed to the middle lane but by that time the distance was too near already (less than 3m). Although he applied brakes

immediately, the car could not be stopped in time and it proceeded to knock the appellant. There was nothing he could do apart from applying the emergency brakes immediately as the distance was too near and he was in the state of shock.

[5] The appellant's memorandum of appeal and the respondent's cross-appeal is too lengthy and repeats the same or related issues in different manner. For the appellate court to deal with issues relating to the appeal, The memorandum of appeal or cross-appeal must state concisely and under distinct heads, without arguments or narrative, the grounds of objections to the decision appealed against, and specifying the points of law or fact which are alleged to have been wrongly decided, such grounds to be numbered consecutively.

[6] For the purpose of this case, I will first deal with liability and I will say that the respondent has framed his submission in an articulate manner, making it convenient for me to write this judgment. The respondent says it is the appellant who is responsible for the accident. I am inclined to accept the submission of the respondent to some extent for the following reasons: (a) It is the appellant's evidence during cross-examination that the traffic was moderate at the material time. She admitted before she crossed, she did see the lorry coming. She agreed that with the said lorry approaching, she was aware of the fact that she would not be able to cross the road uninterrupted and that she would have to stop in the middle of the road to let the lorry pass before she could continue crossing. According to her, she did not wait for the traffic to clear but proceeded to cross and true enough, when she reached the middle lane, the lorry was too near to her so she had to stop to let the lorry pass and whilst standing at middle of the road thereat (middle lane), she was knocked down by the respondents" car. (b) She testified that the respondents" car was just behind the lorry before it knocked against her but she could not see the respondents" car because her view was blocked by the lorry at the material time. (c) She said that she was aware of the fact that it is very common for vehicles changing lane at the road concerned; that is, for a vehicle travelling from the corner near the Mc Donald's restaurant (far right lane of Jalan Tun Jugah) intending to go to Jalan Abell/Pending, it will have to change to middle lane or far left lane. (d) According to her, she was aware of the zebra crossing at the Holiday Inn hotel and Mc Donald restaurant (for safer crossing) but she did not cross through it because it was more convenient, near and direct to cross in front of the entrance of Tun Jugah building. (e) Further, it is the unchallenged evidence of the first respondent that at the material time, there were vehicles proceeding on the said road, ie a medium size lorry followed by the respondents" car and another car at the far left lane. (f) In the circumstances aforesaid, I take the view that the appellant should not have crossed the said road at the material time. A prudent thing for her to do would have been to wait for the traffic to clear. The appellant should not have just simply assumed that it would still be safe for her to cross the road at the material time and create a dangerous situation for her by having to stand in the middle of the road, waiting for the said lorry to pass before she could continue crossing. (g) The appellant in her evidence admitted that she was not sure of any vehicle following behind the lorry as her view was blocked by the said lorry. (h) I take the view that it was so imprudent and careless of the

A appellant in this case, to still proceed to cross the said road despite the fact that she was well ware of the high risk, uncertainty and danger involved. (i) Alternatively, the appellant should have used the zebra crossing (controlled by traffic lights) in front of the Holiday Inn to cross to Tun Jugah at the material time. Her reason that it was very far and not practical to use it is not acceptable at all as it is a fact that the distance B of the zebra crossing in front of Holiday Inn from the place where the appellant was crossing is only about 20–30m. In any event, one should not have compromised his/her life with such a very trivial thing ie 'out of convenient' as what the appellant did in this case.

C **[7]** The above findings and proposition of law is supported by a number of cases; to name a few are as follows: (a) *Tominan bte Tukimin v Toh Kai Chup* [1985] 2 MLJ 345; [1984–1985] SLR 604 (also (b) *Wong Ah Sing v Government of Singapore & Ors* [1968] 1 MLJ 1 (also [1965–1968] SLR 626; (c) *Bong Miew v Patrick Ting* [1981] 2MLJ 209; (d) *Soo Wai Seng v Tan Kim Lock* [1986] 2 MLJ 61.

D **[8]** The above cases are relevant and deals with: (i) pedestrians in the process of crossing the road who was knocked down by the approaching vehicles; (ii) failure on the part of the pedestrians to exercise proper care and attention before crossing; (iii) crossing the road despite the fact that it was clearly unsafe for the pedestrians to do so; (iv) drivers were not in the position to see the pedestrians in advance or sufficient E time to avoid collisions; (v) where drivers were put in the situation of 'agony of the moment'.

[9] The respondent also complains that the learned judge had erred in law and fact in failing to apply the doctrine of 'agony of the moment' in favour of the first respondent in the circumstances of this case. For this proposition, the respondent F relies on the following cases, namely: (a)*Omnibus Co Bhd v North South Transport Sdn Bhd* [1978] 2 MLJ 246 (b) *KR Taxi Services Ltd & Anor v Zaharah & Ors* [1969] 1 MLJ 49 (c) *Foo Siang Him v AG* [1986] 2 MLJ 267 (also [1984–1985] SLR 434.

[10] On a milder tone, the respondent says the learned trial judge had erred in law G and fact and misdirected herself in not finding that the appellant was guilty of contributory negligence for the said accident which is clearly against the weight of the evidence and submits as follows:

(a) the appellant's own evidence and admission at trial is prima facie proof of an act of negligence on the part of the appellant ie failure to care for her own safety and failure H to exercise proper lookout and attention. The fact that the appellant proceeded to cross the said road in the manner she did in this case (in stages or lane by lane in the path of oncoming traffics) despite it was not safe for her to do so and she was well aware of such a high risk or danger involved, I submit was a sheer act of negligence for failing to take reasonable care of her own safety and to exercise proper attention. The learned trial judge had erred in law and fact in finding that the Appellant was not negligent I when she crossed the said road in stages (lane by lane) in the path of approaching vehicles and to wait in between lanes to let vehicles pass before she continued to cross; (b) such a finding is utterly wrong in law; (c) as a matter of legal principle, a pedestrian

should only cross a road when it is clear and safe for him/her to cross. A pedestrian is duty bound to care for her own safety and the safety of the approaching motorists and to exercise proper lookout before crossing; (d) it may be a common sight (as the learned sessions court judge pointed in her grounds of judgment) for pedestrians to cross lane by lane and to wait in between lanes to let vehicles pass before they continue to cross just as what the appellant did in this case but that does not mean such an act of crossing is justified in every circumstances and/or permitted in law. The finding of the sessions court judge seemed to suggest that it is alright for pedestrian to cross the road in such a manner (lane by lane) despite it is unsafe for him/her to do so and the moment the pedestrian safely crosses the first lane, he/she had discharged his/her duty of care and in turn the duty of care falls heavily on and/or shifted to the approaching traffics not to collide with the pedestrian otherwise, if accident happens, liability 100% on the approaching traffic. Such a finding by the sessions court was wrong in law and clearly against the well established traffic principle ie a pedestrian is duty bound to take due care and attention when crossing the road. A pedestrian should only cross a road when it is clear and safe for him/her to do so. Such duty to take due care and attention exist right before he/she crosses the road and will only be discharged upon completion of the crossing; (e) basic and simple understanding, 'clear and safe to cross' would mean there is no approaching vehicle on the said road and if there is, it must be at reasonable distance which would allow the pedestrian to have sufficient time to cross the road from one side to the other side safely and uninterruptedly; (f) even if it is lawful for a pedestrian to cross a road in the manner as the appellant did in this case, he/she should only cross when it is apparently safe to do so. The burden is on the pedestrian to prove that his/her action is justified in the circumstances; (g) in the present case, with the vehicles near approaching the appellant and the uncertainties ie her view was blocked by the lorry and other circumstances, certainly it was not clear and/or unsafe for her to cross the said road at the material time. It was sheer careless and imprudent for the appellant not to wait for the traffics to clear but chose to cross the road in the circumstances and in the manner she did in this case. Clearly, she took a great risk in crossing the road when it was unsafe for her to do so and the appellant in the circumstances aforesaid did not in her own interest take reasonable care of herself, and contributed, by that want of care, to her own injury. The learned trial Judge had erred in law and fact in not finding that the Appellant, by standing in the middle of the road with oncoming vehicles had created a sudden and extreme danger not only to herself but also to the other motorists in particular the first respondent; (h) the law of traffic is settled that one should not be standing in the middle of the road under any circumstances. What more to say when there are traffics approaching him as in this case; (i) a person standing in the middle of the road with vehicles approaching, definitely would pose danger to the approaching traffic; high risk of being collided into. The appellant in the present case cannot simply assume and expect all the approaching motorists would be able to see her presence standing in the middle of the road in sufficient time to avoid collision her; (j) as in this case, the circumstances are clear that it was not possible for first respondent to see the appellant not until he shifted to the middle lane but by that time it was too late for him to avoid collision with the appellant; (k) it is certainly not right for the court to put the blame totally on the first respondent who failed and in fact was not in the position at all to anticipate the folly of the appellant to care for her own safety in the first place; (l) even in the case of a car driver who failed to take proper precautions after he noticed the presence of the pedestrian in advance still the court apportions liability to the pedestrian when there was cause to show that the pedestrian was also guilty of contributory negligence.

[11] Finally, the respondent says that on the facts that liability should be 100% against the appellant or alternatively greater apportionment of contributory negligence ought to be apportioned on the appellant and it should be 75% to the appellant.

[12] After having read the appeal record and submission, I take the view that there was some act of negligence committed by the appellant in this case. The accident was wholly or partly contributed by the negligent act of the appellant crossing the said road. This area of law can be summarised as follows:

(a) In motor accident cases, defence of contributory negligence is available to the defendant, if pleaded to extinguish or limit his ability. In *Caswell v Powell Duffyyn Associated Collieries Ltd* [1939] 3 All ER 722 Lord Wright observed:

> Negligence is the beach of that duty to take care, which the law requires, either in regard to another's person or his property, or where contributory negligence is in question, of the man's own person or property. The degree of want of care which constitutes negligence must vary with the circumstances. What that degree is, is a question for the jury or the court in lieu of a jury. It is not a matter of uniform standard. It may vary according to the circumstances from man to man, from place to place, from time to time. It may vary even in the case of the same man. Thus, a surgeon doing an emergency operation on a cottage table with the light of a candle might not properly be held guilty of negligence in respect of an act or omission which would be negligence if he were performing the same operation with all the advantages of the severe atmosphere of his operating theatre; the same holds good of the workman. It must be a question of degree. The jury have to draw the line where mere thoughtlessness or inadvertence or forgetfulness ceases, where negligence begins.

(b) What may amount to contributory negligence was stated in *Lew Fa v Seng Chong Metal Works Ltd* [1966] 1 MLJ 231, where Abdul Aziz J observed:

> like an inexperienced motor car driver he was likely to step on the accelerator when he meant to apply the brakes. Under those circumstances it could not be said that he failed to take reasonable care of himself or that the carelessness or inadvertence on his part amounted to contributory negligence. There must be something more than that.

[13] In relation to quantum, the memorandum of appeal reads as follows:

(a) that the learned sessions court judge erred in law and in fact in holding that the appellant is only entitled to the sums of RM1,730.93 as her medical expenses, being 1/3 of the amount originally claimed by the appellant, when the fact remains that she had held that the liability of the first respondent to be 100% and that the second respondent to be vicariously liable towards the appellant for the first respondent's acts. As such, the appellant is entitled to full indemnity for medical expenses; (b) that the learned sessions court judge erred in law in holding that the appellant is only entitled to the sums of RM1,730.93 as her medical expenses and agreed with the respondents that only 1/3 of the medical expenses is to be awarded to the appellant and she gave too much weight to the authorities relied by the respondents when it is clear that these said authorities were of different facts from the appellant's case; (c) that the learned sessions court judge failed to give due consideration to the following facts, when she held that the appellant

is only entitled to the 1/3 of the medical expenses originally claimed: (i) the sums originally claimed by the appellant as her medical expenses was nominal as compared to the sums as claimed in the authorities relied by the respondents; (ii) the appellant was admitted to Normah Medical Specialist Centre of Kuching, with the implied agreement of the first respondent and as such there as mutual agreement that these costs and expenses would be payable; (iii) the appellant had never discharged herself from the Sarawak Hospital of Kuching as she was never admitted herself there in the first place after the said accident! She had been at all material times receiving treatment at Normah Medical Specialist Centre after the said accident and as such had never gone against any medical advice as to where to seek treatment for her accident; (iv) despite adducing evidence through DW1, that the Sarawak General Hospital had the expertise of orthopaedic surgeon as well as adequate medical equipment for treatment of spinal bone fracture in 2001, the respondents themselves agreed and continue to let the appellant to be re-examined on her injuries in 2005 for a second opinion at Normah Medical Specialist Centre (see exh 'P-52') and thus expressly admitting that only Normah Medical Specialist Centre had the expertise to give a second opinion of the appellant's injuries; (d) the learned sessions court judge had failed to take into consideration the following fact and evidence, when holding that the appellant is only entitled to the award of RM14,000 for the compensation fracture of T11 vertebrae: (i) she failed to take into consideration of the triple decrease in value of money over a span of 27 years from 1979–2006, when she relied on the case of *Hamzah bin Abdul Ghani v Verghese Thomas* [1979] in deciding to follow the quantum of above award. In fact it should be increased by three times; (ii) she failed to take into consideration that in the case of *Ismail bin Haji Manap & Anor v Onn Swee Imm* [1992] 2 CLJ 1157, the award for a similar injury was in the sum of RM18,850 even though it was only in the year of 1997, some ten years ago and as such ought to be at least doubled; (e) the learned sessions court judge has given too much weight in relying on the case of *Lai Chi Kay & Ors v Lee Kuo Shin* [1981] 2 MLJ 167, to disallow the appellant's claim for visit by family members in the sums of RM160 only. The facts of the said case are very different from the appellant's case and the sums claimed by the plaintiff in the *Lai Chi Kay*'s case is far too much from the sums claimed by the appellant which is nominal; (f) the learned sessions court judge erred in fact in only allowing the sums of RM350 per month for the cost of care (by the plaintiff's mother) relied on the case of *Bujang Mat & Anor v Lai Tzen Hai & Anor* [2004] 4 CLJ 137. In fact, the learned judge in this had specifically agreed that the cost of hiring a maid in Kuching would be in the region of RM500, not RM200–350 only and to award less than a maid rather than more is wrong in fact; (g) the learned sessions court judge has failed to give due consideration to the following evidence, when holding that the appellant was only earning, including commission of not more than RM1,100, namely: (i) that the appellant's oral evidence and PW5's oral evidence as to the fact that the appellant was not required to sign any book or voucher when she received her salary and commission and that the evidence on the amount of salary and commission received by the appellant when she was still employed by British Tailor are consistent and no reason to disbelieve her had been adduced by the defendants; (h) the learned sessions court judge has misdirected herself when she held that PW5 had contradicted himself by saying that British Tailor had their record of salary but he did not keep it anymore after the appellant did not turn up for work for so many years, when PW5 had stated in his oral evidence that there was no need for British Tailor to keep any record of commissions received by the appellant and could not have contradicted herself.

[14] In response to the appellant's submission, the respondent says: in respect of grounds 1 to 3 relating to medical expenses, the learned sessions court judge was right in only allowing 1/3 of the medical expenses incurred by the appellant in the private

hospital (NMSC) ie RM1,730.93 only. Her finding was greatly supported by the available evidence adduced and the authorities cited. The appellant had not established that it was justified for her to seek treatment at NMSC; that her injuries were critical and urgent treatment was necessary and the treatment of her injuries were not available in the SGH, and if available, the treatment would be grossly inadequate. On the contrary, the respondents had established the following evidence at trial: (i) it is a fact that it was nearer to go to SGH than NMSC from the place of accident; (ii) at the material time, the treatment for spinal injury was readily available at SGH. DW1 confirmed that SGH had the expertise of orthopaedic surgeon (four surgeons) as well as adequate medical equipment for treatment of spinal bone fracture at the material time. His evidence was not challenged. The first respondent wanted to send the appellant to SGH but she refused and insisted to be sent to NMSC. This was confirmed by the appellant's own evidence. The injuries sustained by the appellant were not critical. The evidence of specialists, Dr Francis Ting (PW1), Dr Dennis Yu (PW4) and Dr Paul Chew (DW2) confirmed that the treatments given were mainly pain killers and bed rest. No operation was done as the compression fracture was mild, usually the fracture would unite by itself. The learned judge states in her grounds of judgment that: 'To summarise my view on the issue … But, if he seeks treatment at a private hospital, he has to prove, first that he is justified to seek treatment at a private hospital and, secondly, the amount is reasonable.' She went on to say that: 'Bearing in mind the above guidelines, I regret to find that the plaintiff has failed to overcome the first hurdle of proving that she was justified to seek treatment at NMSC. Other than saying that NMSC is a specialist centre with more doctors and easier to get treatment, the plaintiff has not adduced evidence to show that her injuries were critical, the treatment of her injuries were not available in the SGH, and if available, it would not be available within a reasonable period considering the urgency of the treatment or it is grossly inadequate'. On the contrary, the defendant had adduced evidence through DW1 that at the material time there were orthopaedic surgeon (four in 2002) and adequate equipment available in the SGH.

[15] In respect of ground 4 which relates to 'mild wedge compression fracture of T11 vertebrae', the respondent says: (a) the learned sessions court judge was again right in awarding the sum of RM14,000 for the mild wedge compression fracture of T11 vertebrae. Her finding was supported by the medical evidence and the authorities cited. The learned trial judge had given due consideration to all the evidence adduced on the nature of the injuries sustained by the appellant including the evidence of the specialists. The learned trial judge also took into account the inflation factor in determining the fair and reasonable amount of award for such injuries; (b) on the alleged backache, there was no evidence that the backache was constantly suffered by the appellant. Neither was there any evidence to indicate that the alleged backache, if at all it was present, was severe; (c) Dr Dennis Yu (PW4) testified that 'The person who suffered this not necessary always suffered pain. The pain should reduce with the healing.' Dr Paul Chew (DW2) testified that 'If the pain was severe, the patient may not even be able to walk. If the pain is present all the time, movement of the back would not be possible. Based on my examination of the patient, her pain is not severe;' (d) from the medical evidence, the injury to the T11 was not as serious as alleged by the appellant; (i) in *Yin Xiao Lian v Ang Hoo Kim* [135] MD 6; the court awarded SGD10,000 for fracture of thoracic vertebrae; (j) in

Ismail bin Haji Manap & Anor v Onn Swee Imm [236] MD 6; [1992] 2 CLJ 1157; the second appellant suffered fracture of the spine at "C7 vertebrae", fracture of two right rib bones with pneumothorax and fracture of the spine at "T4 vertebrae" which caused paralysis from chest downwards. The court awarded RM6,650 for the fracture of the spine at "C7 vertebrae" and RM18,850 for the fracture of the spine at "T4 vertebrae"; (e) the difference between *Ismail*'s and our present case is that the injuries sustained by the second appellant in *Ismail*'s case were more serious (fracture to C4 and T4) which caused paralysis from chest downwards. The appellant in the present case on the contrary merely suffered compression fracture of T11 which was termed as 'mild' with no serious disabilities except the alleged back pain (which according to the specialist evidence was not severe); (f) in the case of *Hamzah bin Ghani v Verghese Thomas* [1981] 2 MLJ 329, cited by the appellant, the court awarded $18,000 for wedge-compression fracture of 3 lumbar vertebrae with residual deformities ie logically RM6,000 for each vertebrae. Mohammad Azmi J in his judgment states:

> Further, the assessment of $18,000 for the three wedge-compression fractures is not out of line with *Foo Chik Seow* case (ante) where $4,000 was awarded for fracture of one vertebra, or with Tan Jack case (ante) where $6,000 was awarded for a wedge fracture of third lumbar vertebra.

(g) in the light of the medical evidence adduced and the authorities cited aforesaid, the sum of RM14,000 for the mild compression fracture of T11 awarded by the sessions court to the appellant which is slightly above double the award in *Hamzah*'s caseis indeed fair and reasonable.

[16] In respect of ground 5 relating to cost of visit by family members, the respondent says: (a) the appellant had failed to prove her claim under this head simply by adducing receipt or bill as proof of the alleged transportation. Further, none of the family members were called to support her claim on the alleged transportation cost by family members. The court was also not enlightened as to the type of transportation used; (b) in *Noor Famiza bte Zabri & Anor v Awang bin Muda & Anor* [1994] 1 MLJ 599; the appellants sought expenses incurred for funeral services, damage to clothing and the transportation charges but these items were not granted as the appellant failed to prove them strictly; (c) the appellant had not adduced evidence that the alleged visit and companionship by the family members would help her towards rehabilitation or healing as pointed out by the learned sessions court judge in her grounds of judgment; (d) in *Lai Chi Kay & Ors v Lee Kuo Shin* [1981] 2 MLJ 167, the court held:

> in the normal run of cases, a third party will have no direct remedy against the wrongdoer. In the present case there was no medical evidence that there was a need for the companionship of the mother for the rehabilitation of Lai. The claim for loss by the third and fourth plaintiffs was therefore not allowed.

(e) the learned trial judge was right in relying on the aforesaid case of *Lai Chi Kay* and disallowing the claim by the appellant for cost of visit by family members.

[17] In respect of ground 6 relating to costs of care by the mother, the respondent says: (a) the learned sessions court judge states: 'The plaintiff claims RM500 per month as costs of nursing care, which I find is too high considering the current trend

in hiring an Indonesian maid in Kuching is in the region of RM200–RM350'; (b) the learned trial judge had taken judicial notice of the current trend in hiring an Indonesian maid in Kuching which is in the region of RM200–RM350 and also taking into account the condition of the appellant (which was not that serious) when allowing the sum of RM350 per month for cost of care by the mother; (c) the appellant on the other hand had not adduced any evidence that the cost of hiring an Indonesian maid in Kuching is in the region of RM500 as alleged; (d) the appellant's contention that the High Court in *Bujang Mat*"s case had specifically agreed that the costs of hiring a maid in Kuching would be in the region of RM500 is rather incorrect. The learned High Court in *Bujang Mat*"s case said this:

> In the third place, counsel for the defendants submitted that it would not cost RM700 per month to hire a maid in Kuching and that the court may take judicial notice that it would cost RM500 per month to hire a maid in Kuching. I regret I cannot agree. While it may be the norm to be able to hire a maid for RM500 per month in Kuching we are here talking about hiring a maid to assist in caring for a person in the physical condition of the first plaintiff and I have no doubt that it would cost more to hire a maid for the first plaintiff's purposes. In the circumstances I find the learned sessions court judge's estimate reasonable.

(e) furthermore, there is a major distinguishing fact that is in *Bujang Mat*'s case (above); the said injuries to the first plaintiff were of such severity that the aftermath of the collision caused him to be in a vegetative state while in our present case, the appellant was not. (f) the learned sessions court judge was not wrong in adopting the figure of RM350 under this head.

[18] In respect of grounds 7 and 8 'earning of more than RM1,000', the respondent says: (a) it is settled principle of law that in appeal where facts have to be reviewed, it is undesirable to do so where the conclusions reached must to a large extent depend on the credibility of the witness and the impression formed by a court which has seen them and can judge their honesty and accuracy (see *China Airlines Ltd v Maltran Air Corp Sdn Bhd* [1996] 2 MLJ 517; *Seng Heng Electrical v Chua Len Teng* [1970] 1 MLJ 67); (b) in the present case, there was no documentary evidence adduced to support that the earnings of appellant was RM1,550 per month (basic salary RM550 plus commission RM1,000) at the time of accident as alleged; (c) the conclusion reached by the learned trial judge that the total pay the appellant received per month including the commission could not be more than RM1,100 was purely based on the oral evidence of the appellant and PW5 which the court found rather tardy, contradictory and doubtful, especially on the alleged commission. It is evident on cross-examination of the appellant and PW5, they could not even explain how the commission was calculated; (e) the learned trial judge in her judgment states:

> I find it incredulous that British Tailor did not keep any record in respect of cash payment of staffs" salaries. For this reason and coupled with his contradicting testimony as aforesaid, I am slow to believe PW5's testimony on the commission received by the plaintiff.

(f) she further adds:

> I believe and accept that the plaintiff earned extra income through commission. I am however inclined to think the total pay she received per month including the commission could not be more than RM1,100. I say so because if it were more than RM1,100 (which she is now earning from working for her brother), the plaintiff would surely have claimed

for the loss of income, which she never did as the same was never pleaded in the statement of claim. Accordingly, it is my finding that the plaintiff was earning not more than RM1,100 at British Tailor.

(g) since the conclusion reached by the learned sessions court judge on total pay per month received by the appellant (ie not more that RM1,100 inclusive of commission) depends entirely on the credibility of the appellant and PW5 and the impression formed by the court which had seen them, it not desirable for the appellate court to interfere with her finding.

[19] From the reading of the memorandum of appeal, I take the view that the appellant almost in every instant is not happy with the quantum awarded under various heads of damages. The respondent on the other hand purely focuses on the issue of liability, and says that the liability ought to have been 100% against the appellant. In civil cases, it is necessary and essential to identify in the memorandum of appeal the law and legal burden of proof in respect of liability and quantum the trial judge is said to have erred. Purely setting out factual narration in length without identifying the relevant aspect of the law does not help the appellate judge to identify the issues of law for determination. Support for my proposition is found in a number of cases and to mention a few are as follows:

(a) In *Huo Heng Oil Co v Tang Tiew Yong* [1987] 2 MLJ 723, it was stated that appeals are by way of rehearing. However, the appellate court will not normally disturb the findings of the lower court if the triability of an issue was dependent on evidence and fact as opposed to an issue of law.

(b) In *Eng Thye Plantations Bhd v Lim Heng Hock & Ors* [2001] 4 MLJ 26 Justice Gopal Sri Ram JCA made the following observations (at pp 31–31):

> (a) Appellate courts do not make findings of fact. They merely review the finding of primary fact made by the trial court because this function is confined exclusively to a trial court; (b) However the appellate court may draw inferences from the primary facts if these differ from those drawn by the trial court as they are entitled to see what accounts for the difference; (c) The appellate Judge in this instant case was not making any findings of primary fact but only drawing inferences obviously overlooked by the sessions court.

(c) In *Clarke v Edinburgh Tramways Co* (1919) SC (HL) 35, Lord Shaw observed:

> When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observations with regard to credibility or not. I can of course quite understand a court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate court? In my opinion, the duty of an appellate court in those circumstances

A is for each judge of it to put to himself, as I now do in this case, the question, Am I — who sit here without those advantages, sometimes broad and sometimes subtle, which are the privileges of the judge who heard and tried the case — in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

(d) In *Yong Nyee Fan & Sons Sdn Bhd v Kim Guan & Co Sdn Bhd* [1979] 1 MLJ 182, the Federal Court stated that an appellate court should not lightly differ from the trial judge's findings of fact or his rating of the credibility of the witnesses whom he had the advantage of seeing and hearing. Further, the court stated that if inferences are to be drawn from the evidence, the appellate court is in a good position as the trial court.

[20] Further, it is essential to note that the burden of proof always rests on the plaintiff to establish the liability as well as quantum. The defendant, if he wants to challenge the issue as to liability, must show how the plaintiff has not satisfied the requirement of proof by relating to ss 3 and 101 of the Evidence Act 1950 ('EA 1950'). I have dealt with the importance of ss 3 and 101 of EA 1950 in some detail in the case of CRA–41–20–2006–II *PP v Mohd Aszzid Abdullah* where the judgment was delivered on 18 June 2007 and and I repeat the relevant part for the purpose of this appeal as follows:

10. As the crux of the issue related to this appeal materially depends on the question of prima facie case, in my view to appreciate and understand this concept in the right perspective, it is essential to read the relevant provisions of the CPC with EA 1950. In almost all the cases which dealt with the issue relating to prima facie case, the courts did not deal with the EA 1950 and in my view much confusion has been caused, before the decision of the Federal Court in *Balachandran*.

11. A prima facie case materially consists of more than two concepts related to EA 1950. They are issues relating to standard of proof (see s 101 to 103 EA 1950) and weight of evidence or also referred to as probative value or probative force (see s 3 of EA 1950). A prima facie case cannot be equated to burden of proof alone. Further, a prima facie case cannot be equated to the concept of maximum evaluation of evidence only. However, to define a prima facie case, the element relating to the standard of proof and weight of evidence becomes inextricably interwoven. The phrase maximum evaluation or minimum evaluation or credible evidence is not a term of art used in common law jurisprudence in the law relating to evidence. The nearest equivalent to this term in the law of evidence will be in my view, weight of evidence or probative value etc. Further maximum or minimum evaluation or credible evidence does not relate to standard of proof. Because these terminologies, when they first appeared in Malaysian cases, were not explained within the regime of EA 1950, they may in my view have lead to much confusion and this is reflected in the submission of the prosecution, as the prosecution had relied on the following cases namely: *Munusamy v PP* [1987] 1 MLJ 492; (ii) *Dalip Bhagwan Singh v PP* [1998] 1 MLJ 1; (iii) *PP v Tan Sri Muhammad bin Muhammad Taib* [1999] 2 MLJ 305; (iv) *PP v Saare Hama & Anor* [2001] 4 CLJ 380; (v) *Looi Kow Chai & Anor v PP* [2003] 1 CLJ 734; (vi) *Arulpragasan Sandaraju v PP* [1996] 4 CLJ 597; (vii) *Hwa Tua Tau v PP* [1981] 1 CLJ 123; (viii) *Tan Chai Keh v PP* [1948–49] Supp 105; (ix) *PP v Kasmin Soeb* [1974] 1 MLJ 230; (x) *Khoo Hii Chiang v PP* [1994] 2 CLJ 151 SC; (xi) *Dato' Mokhtar Hashim v PP* [1983] 1 CLJ 101; (xii) *PP v Krishna Rao A/L Gurumurthi* [2000] CLJ 446; (xiii) *PP v Dato' Seri Anwar Ibrahim (No 3)*

[1999] 2 CLJ 215; (xiv) *PP v Sukumaran a/l Sudram* [1999] 4 CLJ 242; (xv) *PP v Ong Cheng Heong* [1998] 4 CLJ 209; (xv) *PP v Chin Yoke* [1940] MLJ 47; (xvi) *PP v Mohan Singh* [1999] 4 CLJ 620; (xvii) *Balachandran v PP* [2005] 1 CLJ 85.

12. The word 'proof' means anything, which serves to convince the mind about the truth or falsehood of a proposition. Under s 3 of EA 1950 a fact is said to be proved when after considering the matters before it, the court either: (a) believes it to exist; or (b) considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does exist. The extent to which a particular piece of evidence aids to prove a fact in issue is called its probative force. It is necessary for the probative force to be sufficient to induce the court: (i) to believe in the existence of the fact; and/or (ii) to consider its existence so probable that a prudent man may act upon the supposition that it exists. The test whether a matter has been proved or not is objective in nature and the test is-would a prudent man, after considering the matters before him deem the fact in issue proved or disproved. The word 'disproved' is exactly the opposite of 'proved' and is defined again in s 3 of EA 1950 to emphasise its importance. A fact is said to be disproved when, after considering the matter before it, the court either: (a) believes that it does not exist; or (b) considers its non-existence so probable, that a prudent man ought under the circumstances of the particular case, to act upon the supposition that it does not exist. The term 'not proved' is explained in s 3 of the EA 1950. A fact is said to be not proved when: (a) it is neither proved; (b) nor disproved. When a fact has not been proved by the party on whom the burden lies, that is to say, when the said party has given no evidence or has given evidence, which is not sufficient to establish the fact, the fact is said to be not proved. There is a useful maxim: 'falsus in uno falsus in omnibus' which means if a thing is false in respect of one it must be taken to be false in respect of all (see *Nisar Ali v State of UP* AIR 1957 SC 366). This maxim does not occupy the status of law in Malaysia. However, sometimes, counsels do argue that if a part of the evidence given by a witness has been disbelieved, the whole of it should also be disbelieved, as a rule of law. In my view, such line of argument may hold water now in this juncture, provided the judge is convinced at the prima facie stage that a prudent man ought to, under the circumstances of the particular case, act upon the supposition that it does not exist.

13. When a person is bound to prove the existence or non-existence of any fact, then it is said that the burden of proof lies on that person. Burden of proof can be defined as the obligation, which is imposed on a party to adduce sufficient evidence in support of his vital contention to result in over all success by him in his case. This is sometimes referred to by some authors as burden of proof simpliciter or the persuasive burden or probative burden or the risk of non-persuasion or burden of proof on the pleadings or fixed burden of proof or ultimate burden etc. The relationship between 'fact in issue' and 'burden of proof' is that, facts in issue are vital issues central to the allegation of the party and failure by him to adduce sufficient evidence in support of a fact in issue means that he has failed to discharge the legal burden and thus he will fail in his over all contention. Thus, it can be said that proof of 'fact in issue' is the sine qua non for establishing legal burden. In deciding the 'fact in issue', maximum evaluation test as asserted by the Federal Court in *Balachandran* must be meticulously followed.

[21] The issue which I need to determine in respect of this appeal is basically whether the plaintiff has adduced sufficient evidence to justify that the defendant was 100% liable, taking into consideration the evidence led by the defendant to rebut the plaintiff's case. Secondly, on a smaller note, whether the quantum awarded is reflective of the damages awarded by the learned sessions judge. For this purpose, I have to say great reliance of cases is of no help as each issue may have been decided

on its own facts except for heads like loss of earnings and alike where there is clear proof of earnings to calculate according to law, the quantum may be more precise. Awards for damages on the following heads such as medical expenses nursing care etc. may depend on its own facts and case precedents are of no help. The heads of claim in such cases cannot be equated to some precedents of case laws to justify the claim. In this case, the appellant has taken great trouble to deal with a number of cases which has been decided on its own facts in awarding damages. The approach an appellate court should take when hearing an appeal against quantum is set out in *Tan Kuan Yau v Suhindrimani* [1985] 2 MLJ 22 where his Lordship Abdul Hamid CJ (Malaya) speaking for the Supreme Court said:

> Now, in an appeal on quantum of damages it is essential in order to come to a conclusion to bear in mind certain principles which are well established. The appeal court is slow, disinclined to interfere with the judge's finding merely because the appeal court thinks that if the case had been before it in the first instance a lesser sum would have been awarded. Azmi CJ (Malaya) (as he then was) giving the judgment of the Federal Court in *Topaiwah v Salleh* said that: '... so far as this court is concerned we should, to paraphrase Greer LJ in *Fling v Lovell* be disinclined to reverse the finding of a trial judge as to the amount of damages merely because we think that if we had tried the case in the first instance we would have given a lesser sum. To justify reversing him, we should be convinced that he acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it an entirely erroneous estimate of the damage. The assessments which the courts have made over the years form some guide to the kind of figure which is proper and which the appellate court will follow in the light of the special facts of each particular case (see *Fling v Lovell*)' In *Greenfield v London and North Eastern Railway Company*, Mackinnon LJ had this to say: 'The principle on which the Court of Appeal reviews the assessment of damages, whether too high or too low, is not because the Court of Appeal might have given rather more or rather less, but only (1) if the judge has omitted some relevant consideration or admitted some irrelevant consideration, or (2) if the amount is so excessive, or insufficient, as to be plainly unreasonable.' Lord Evershed MR in *Wilson v Pilley* emphasized that: 'Interference by this court with an award of damages by the trial judge must be a rare thing, and may I say that it should be perhaps even rarer in relatively small cases tried in the county court. No one would suggest that, because this court thought that the damages small in any case, were rather on the low side, this court could consider for a moment slightly raising the figure or adopting the converse course in a different kind of case. In other words, the onus on an appellant seeking to interfere with an award of damages, particularly within this sort of scale, is a heavy one.' We would also refer to *Elliott v Preston* where Salmon LJ had this to say: 'Before we can interfere, there has to be (in the phrase which is hallowed, but has now I think a rather archaic ring) a wholly erroneous estimate of damage. That I have always regarded as meaning that a court has to be satisfied that it is very wrong. If you are satisfied that it is wrong, and seriously wrong, then not only is this court entitled to interfere, but it is its duty to interfere. I would agree... that you cannot say, if it is wrong by such and such a percent, you do interfere, and if it is not you do not. I think each case stands by itself, and a great deal depends upon the amount of the award.'
>
> The principle that could guide this court in determining whether it should interfere with the quantum of damages is crystal clear. What is also clear is that much depends on the circumstances of each case, in particular the amount of the award. In a particular case therefore it is for the appeal court to consider whether in the light of the circumstances of that case there is an erroneous estimate of the amount of the damage in that, either there was an omission on the part of the judge to consider some relevant materials, or he had admitted for purposes of assessment some irrelevant considerations. If the court is satisfied or convinced that the judge has acted upon wrong principles of law then it is justified in reversing; indeed, it is its duty to reverse the finding of the trial judge.

[22] On the issue whether the court was right in only allowing 1/3 of the medical expense, I take the view that on the facts of the case the finding and the discretion of the court must not be disturbed. Support for my proposition is found in the case of *Chai Yee Chong v Lew Thai* [2004] 2 MLJ 465, where it was contended that the injuries affected earning capacity and the plaintiff was entitled to private hospital expenses. Abdul Hamid Mohamed FCJ made the following observations:

> … (a) It is a matter of principle that the quantum of damages awarded for private medical expenses must be reasonable. (b) If the treatment sought was at a government hospital, then the expenses incurred should be awarded as a matter of course. (c) However, if the expenses were incurred at a private hospital, the claimant must prove that it was justified to seek treatment at a private hospital and that the amount incurred was reasonable. (d) If the court is not satisfied that the treatment at a private hospital was justified depending on the circumstances and facts of each case, the court should dismiss the claim altogether or award an amount not exceeding 1/3 of what is claimed, which is a matter of practice and not provided by any written law. (e) If it is shown in a particular case that an award of 1/3 of the amount claimed is excessive in relation to expenses that would have been incurred in a government hospital, an amount less than 1/3 may be awarded. (f) The court may award what it considers reasonable, which may be the full amount claimed.

[23] On the issue of liability, in road accident cases, the law can be summarised as follows:

(a) To succeed in a motor accident case, the plaintiff must prove that the defendant was negligent. That is to say that there was a duty on the part of the defendant towards the plaintiff and the defendant negligently performed or omitted to perform his duty and that effectively caused injury to the plaintiff. It must be emphasised that if it can be shown that the plaintiff could have avoided the accident by taking reasonable care, then his action may fail or he may be partly liable for the accident. In *Chang Kan Nan v Ludhiana Transport Syndicate* [1950] MLJ 299 Abbot J observed:

> In the view of this court the driver of every vehicle ought reasonable to anticipate an accident although it may never occur.

(b) In *Lim Kar Bee v Abdul Latif bin Ismail* [1978] 1 MLJ 109, HRH Raja Azlan Shah FJ (as HRH then was) observed:

> At the present time, when road works involving laying of electricity and telephone cables and water pipes adjoining the highway are part of the realities of life, a duty to take reasonable care is owed to road users who may inadvertently leave the road and collide with them.

(c) In *Ramla v Batcha* [1966] 1 MLJ 183 Ismail Khan J (as His Lordship then was) observed:

> Here the Defendant was not faced with a sudden emergency. He knew the road was wet and was aware of the presence of buffaloes when he was still two or three chains away. He should have anticipated the likelihood of any of the buffaloes suddenly moving onto the road and should have slowed down to a pace that would have enabled him to stop almost immediately should he be confronted with a such situation.

(d) In *Chan Kok Sing & Anor v Koo Lan* [1966] 1 MLJ 170, Ong Hock Thye Ag CJ observed:

> I think that the learned judge forgot to distinguish between the case where danger is actually present when the motorist is overtaking such cyclist from behind, all being on the same side of the road and they being unaware of his approach, and the entirely different circumstances when the cyclist and driver are travelling towards each other and no possible danger can be foreseen so long as the cyclists keep a proper look — out and stay on their own proper side. The driver here had no reason to anticipate that the cyclist would run into him so long as he kept to his own side. In all the circumstances therefore I cannot see that any blame whatsoever attaches to the driver of the car.

(e) In *Soo Wai Seng v Tan Kim Lock* [1986] 2 MLJ 61 Eusoff Chin J (as His Lordship then was) observed:

> In my view is that people wishing to cross the Federal Highway should use fly over. The two to three feet high fence erected along the center divider was to prevent people crossing the highway. Each side of the highway had four lanes, indicating the large volume of vehicular traffic using the highway. Slow moving vehicles would be using the left and center lanes, while the fast ones would use the fast lane which was the one nearest the center road divider. In good dry weather, to cross each side of the highway when visibility is good would be highly dangerous to the person doing so. But to cross it during the night and in the rain would be an act amounting to committing suicide. In this case it was a miracle that the plaintiff got over to the center divider. I do not attach any blame to the defendant.

[24] On the facts of the case and based on authorities, I take the view that the appellant could have avoided the accident by taking reasonable care but did not do so. This does not mean that the motor vehicle when passing a busy part of the city can evade total liability after having knocked into pedestrians. The driver must anticipate an accident and take precautionary measures such as defensive driving to ensure that pedestrians who have erred in their judgment in crossing are not knocked into.

[25] I am inclined to agree with the submission of the respondent that in the light of the above, the appellant has failed to show that the learned sessions court judge had assessed the quantum based on a wrong principle of law or taken into account matters that are irrelevant which warrants interference by the court. Accordingly, the appellant's appeal should be dismissed with costs to the respondents. The respondent's cross appeal should be allowed on the following terms:

(i) the judgment of the learned sessions judge finding the first defendant 100% liable be substituted to 50:50 basis.

(ii) costs of the cross-appeal to be paid by the appellant.

[26] Further, it is ordered that the getting up fees for the appeal and cross appeal shall not exceed RM10,000 for each. If costs cannot be agreed the respondent is at liberty to tax his costs. I hereby order so.

Respondent's cross appeal allowed. Appellant's appeal dismissed.

Reported by Chew Phye Ken